



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2016–0100; 4500030113]

RIN 1018-BA75

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Guadalupe Fescue

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for *Festuca ligulata* (Guadalupe fescue) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 7,815 acres (3,163 hectares) in Brewster County, Texas, located entirely in Big Bend National Park, fall within the boundaries of the proposed critical habitat designation. If we finalize this rule as proposed, it would extend the Act's protections to this species' critical habitat. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for Guadalupe fescue.

DATES: We will accept comments on the proposed rule or DEA that are received or postmarked on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE
FEDERAL REGISTER]**. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR
FURTHER INFORMATION CONTACT** by **[INSERT DATE 45 DAYS AFTER DATE OF**

PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on the proposed rule or DEA by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>.

In the Keyword box, enter Docket No. FWS–R2–ES–2016–0100, which is the docket number for this rulemaking. Then click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2016–0100, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Information Requested**, below, for more information).

Document availability: The DEA is available at https://www.fws.gov/southwest/es/AustinTexas/ESA_Our_species.html, at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2016–0100, and at the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this proposed critical habitat designation and are available: at https://www.fws.gov/southwest/es/AustinTexas/ESA_Our_species.html, at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2016–0100, and at the Austin

Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service website and Field Office set out above, and may also be included in the preamble and/or at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Rd., Suite 200, Austin, TX 78758; telephone 512–490–0057; facsimile 512–490–0974. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible.

Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) The amount and distribution of Guadalupe fescue habitat;

(b) What areas occupied at the time of listing, and that contain features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change;

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why; and

(e) Current habitat information within McKittrick Canyon in Guadalupe Mountains National Park and whether any potential habitat areas there may be essential to the conservation of the Guadalupe fescue.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on Guadalupe fescue and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, we seek information on any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(6) Information on the extent to which the description of economic impacts in the DEA is a reasonable estimate of the likely economic impacts.

(7) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the associated documents of the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(8) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. You may request at the top of your document that we withhold personal information such as your street address, phone number, or e-mail address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

All previous Federal actions are described in the proposal to list Guadalupe fescue as an endangered species under the Act, published elsewhere in this issue of the **Federal Register**.

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical

habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the specific features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of

conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Information sources may include the species status assessment; any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools would continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent

when one or both of the following situations exist:

(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or

(2) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Service may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of "critical habitat."

As stated in the proposed listing rule published elsewhere in this issue of the **Federal Register**, there is currently no imminent threat of take attributed to collection or vandalism for Guadalupe fescue, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, we determine if such designation of critical habitat would not be beneficial to the species. In our proposed listing rule, we determined that the present or threatened destruction, modification, or curtailment of a species' habitat or range is a threat to Guadalupe fescue. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and would be beneficial, we find that designation of critical habitat is prudent for Guadalupe fescue.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for Guadalupe fescue is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

- (i) Data sufficient to perform required analyses are lacking, or
- (ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of “critical habitat.”

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for Guadalupe fescue.

Physical or Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, or rearing (or development) of offspring; and
- (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

We conducted a Species Status Assessment (SSA Report) for Guadalupe fescue, which is an evaluation of the best available scientific and commercial data on the status of the species.

The SSA Report (Service 2016; available at:

https://www.fws.gov/southwest/es/AustinTexas/ESA_Our_species.html) is based on a thorough review of the natural history, habitats, ecology, populations, and range of Guadalupe fescue. The SSA Report provides the scientific information upon which this proposed critical habitat determination is based (Service 2016).

Space for Individual and Population Growth and for Normal Behavior

The size of suitable habitat areas for Guadalupe fescue is likely to be important, although we do not know how large an area must be to support a viable population. However, we do know that many plant species in the Chihuahuan Desert have migrated to different elevations and latitudes, or were extirpated, since the end of the late Wisconsinan glaciation (about 11,000 years ago). Larger habitat areas provide more opportunities for populations to migrate, as plant communities and weather patterns change, and therefore may be more suitable. Larger habitats are also expected to support larger populations and greater genetic diversity. We provisionally estimate that habitats of at least 494 ac (200 ha) are more likely to support long-term viability of Guadalupe fescue. Therefore, we determine that relatively large habitat areas that are at least 494 ac (200 ha) are important to provide the necessary space to support the physical or biological feature for this species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Precipitation is important to Guadalupe fescue, as flowering and survival rates are positively correlated with rainfall amount and timing. The amount of rainfall over longer periods, such as the previous 21 months, appears to have more influence on flowering, which occurs from August to October, than rainfall during the previous 9 months or the previous February through May (Service 2016, Appendix B). Population size may be positively

correlated with rainfall over relatively long (33-month) periods. Rainfall (or drought) over shorter time frames appears to have less effect on population size. Precipitation amounts and patterns are weather conditions that support the physical or biological features for Guadalupe fescue.

All historic and extant populations of Guadalupe fescue occur above about 1,800 meters (m) (5,905 feet (ft)) in the Chihuahuan Desert of northern Mexico and Texas, although we do not know the actual elevation tolerance of this species. Many plant species occur at relatively lower elevations in mountains where habitats are relatively cool and moist, such as in narrow ravines, north-facing slopes (in the northern hemisphere), or windward slopes where there is a pronounced rain shadow (higher rainfall on prevailing windward slopes). Larger habitat areas provide more opportunities for populations to migrate, as plant communities and weather patterns change, and therefore may be more suitable. Nevertheless, the 1,800-m elevation contour represents the best available information regarding the elevation tolerance of this species.

Habitat areas do not need to be contiguous to be considered occupied, provided that they are not separated by wide, low-elevation gaps. This rationale is based on expected long-distance dispersal of viable seeds of Guadalupe fescue by Carmen white-tailed deer (*Odocoileus virginianus carminis*), the most common ungulate in the Chisos Mountains. The diet of Carmen white-tailed deer consists of up to 12 percent grasses. Carmen white-tailed deer use habitats with dense stands of oak and the presence of free-standing water, and the range is restricted to elevations above 906 to 1,220 m (2,970 to 4,000 ft). The estimated home range is a radius of 1.1 to 2.4 kilometers (km) (0.7 to 1.5 miles (mi)). Hence, we expect that Carmen white-tailed deer

are able to disperse viable seeds of Guadalupe fescue to potential habitats that are not separated by gaps that are below about 1,000 m (3,208 ft) and more than 2.4 km (1.5 mi) wide.

All known populations of Guadalupe fescue occur in rocky or talus soils of partially shaded sites in the understory of conifer-oak woodlands within the Chihuahuan Desert. The associated vegetation consists of relatively open stands of both conifer and oak trees in varying proportions. Conifer-oak woodlands may occur in areas classified as pine, conifer, pine-oak, or conifer-oak, and as forest or woodland, on available vegetation classification maps. The conifer species typically include one or more of the following: Mexican pinyon (*Pinus cembroides*), Arizona pine (*P. arizonica*), southwestern white pine (*P. strobiformis*), alligator juniper (*Juniperus deppeana*), drooping juniper (*J. flaccida*), and Arizona cypress (*Cupressus arizonica*). Characteristic oaks include one or more of the following: Chisos red oak (*Quercus gravesii*), gray oak (*Q. grisea*), Lacey oak (*Q. laceyi*), and silverleaf oak (*Q. hypoleucoides*). Other broadleaf trees, such as bigtooth maple (*Acer grandidentatum*), may also occur in this element. Therefore, we consider areas of rocky or talus soils of partially shaded sites in the understory of conifer-oak woodlands above elevations of 1,800 m (5,905 ft) within the Chihuahuan Desert to be a physical or biological feature of Guadalupe fescue.

Habitats that are Protected from Disturbance or are Representative of the Historic

Geographical and Ecological Distributions of a Species

The role of fire is very likely important to maintaining Guadalupe fescue habitat for two reasons. First, many grass and forb understory species are stimulated during the years immediately following wildfire, but they decline during long periods without fire. Second, relatively frequent forest wildfires tend to be relatively cool because large amounts of dry fuel, such as dead trees, fallen branches, and leaf litter, have not accumulated; such fires do not kill

large numbers of trees or radically change the vegetation structure and composition. Conversely, wildfires that burn where fuels and small dead trees have accumulated for many years can be very hot, catastrophic events that not only kill entire stands of trees, but also kill the seeds and beneficial microorganisms in the soil, such as mycorrhizal fungi. Fire is probably inevitable in the conifer and conifer-oak forests of the Chihuahuan Desert. Thus, more frequent, relatively cool fires may be essential for the long-term sustainability of these forested ecosystems and of Guadalupe fescue populations.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential for Guadalupe fescue from studies of this species' habitat, ecology, and life history, as described above. Additional information can be found in the proposed listing rule, published elsewhere in this issue of the **Federal Register**, and in the SSA Report (Service 2016). We have determined that the following physical or biological features are essential to the conservation of Guadalupe fescue:

(1) Areas within the Chihuahuan Desert:

- (a) Above elevations of 1,800 m (5,905 ft), and
- (b) That contain rocky or talus soils.

(2) Associated vegetation characterized by relatively open stands of both conifer and oak trees in varying proportions. This may occur in areas classified as pine, conifer, pine-oak, or conifer-oak, and as forest or woodland, on available vegetation classification maps.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management

considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: Changes in wildfire frequency; livestock grazing; erosion and trampling by visitors hiking off the trails; and invasive species.

Management activities that could ameliorate these threats and protect the integrity of the conifer oak habitat include, but are not limited to: (1) Conducting prescribed burns under conditions that favor relatively cool burn temperatures; (2) removing livestock, including stray and feral livestock, from Guadalupe fescue habitats; (3) appropriately maintaining trails to reduce the incidence of trampling and erosion, and informing visitors of the need to remain on trails; and (4) controlling and removing introduced invasive plants, such as horehound (*Marrubium vulgare*) and King Ranch bluestem (*Bothriochloa ischaemum*).

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific and commercial data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are proposing to designate critical habitat in areas within the United States that are occupied by Guadalupe fescue at the time of proposed listing in 2016. Occupied habitat for Guadalupe fescue is defined as areas with positive survey records since 2009 (when the Maderas del Carmen population in Mexico was last documented), and habitat areas around sites with positive survey records that contain conifer-oak woodlands and that are not separated by gaps of lower-elevation (<1,000 m) terrain and are

within the maximum distance that seed dispersal is expected to occur (about 2.4 km (1.5 mi)).

Habitat areas do not need to be contiguous to be considered occupied, provided that they are not separated by wide, low-elevation gaps. This rationale is based on expected long-distance dispersal of viable seeds of Guadalupe fescue by Carmen white-tailed deer, the most common ungulate in the Chisos Mountains. The diet of Carmen white-tailed deer consists of up to 12 percent grasses. Carmen white-tailed deer use habitats with dense stands of oak and the presence of free-standing water, and the range is restricted to elevations above 906 to 1,220 m (2,970 to 4,000 ft). The estimated home range is a radius of 1.1 to 2.4 km (0.7 to 1.5 mi). Hence, we expect that Carmen white-tailed deer are able to disperse viable seeds of Guadalupe fescue to potential habitats that are not separated by gaps that are below about 1,000 m (3,208 ft) and not more than 2.4 km (1.5 mi) wide.

Sources of data on Guadalupe fescue occurrences include: The Texas Natural Diversity Database; herbarium records from the University of Texas, Missouri Botanical Garden, and University of Arizona; a survey report by Valdés-Reyna (2009); a status survey (Poole 1989); and monitoring data from Big Bend National Park (Sirotnak 2014). We obtained information on ecology and habitat requirements from the candidate conservation agreement (Big Bend National Park and Service 2008), scientific reports (Camp et al. 2006; Moir and Meents 1981; Zimmerman and Moir 1998), and Rare Plants of Texas (Poole et al. 2007). Big Bend National Park (2015) provided a recently revised vegetation classification map of the Park. We used Digital Elevation Models created by the U.S. Geological Service. We documented a review and analysis of these data sources in the SSA Report (Service 2016).

Areas Occupied at the Time of Listing

The proposed critical habitat designation includes the only known extant population of

Guadalupe fescue in the United States, within the Chisos Mountains of Big Bend National Park, which has retained the physical or biological features that will allow for the maintenance and expansion of the existing population (criteria described above). Guadalupe fescue historically occupied one additional site in the United States in McKittrick Canyon within Guadalupe Mountains National Park. However, we are not proposing critical habitat there because the species has not been observed since 1952, and it is unlikely that the area is occupied at the time of listing (Armstrong 2016; Poole 2016; Sirotnak 2016). The best available information indicates that Guadalupe fescue is extirpated from McKittrick Canyon, and the habitat would no longer support the species due to the abundance of invasive grasses such as King Ranch bluestem, and, therefore, we do not consider the area within McKittrick Canyon to be essential for the conservation of the species.

We are proposing a single unit of critical habitat consisting of five subunits totaling 7,815 acres (ac) (3,163 hectares (ha)). Although currently Guadalupe fescue plants have only been found in Subunit 1, we consider all subunits to be occupied because they are not separated by gaps of lower-elevation (<1,000 m) terrain greater than 2.4 km (1.5 mi) wide. All subunits are within the Chisos Mountains of Big Bend National Park (see map in the **Proposed Regulation Promulgation** section, below). See Table 1, below, for summaries of land ownership and areas. No units or portions of units are being considered for exclusion or exemption.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for Guadalupe fescue. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently

left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing for designation of critical habitat lands that we have determined are occupied at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential to the conservation of the Guadalupe fescue. We propose to designate one critical habitat unit, consisting of five subunits within the Chisos Mountains, that contains all of the identified physical or biological features to support the life-history processes of Guadalupe fescue.

This proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the **Proposed Regulation Promulgation** section. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on

<http://www.regulations.gov> at Docket No. FWS-R2-ES-2016-0100, on our Internet site (https://www.fws.gov/southwest/es/AustinTexas/ESA_Our_species.html), and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

Proposed Critical Habitat Designation

We are proposing to designate approximately 7,815 ac (3,163 ha) in one unit containing five subunits as critical habitat for Guadalupe fescue. The critical habitat area we describe below

constitutes our current best assessment of areas that meet the definition of critical habitat for Guadalupe fescue. The area we propose as critical habitat is shown in Table 1.

TABLE 1. Occupancy, land ownership, and size of Guadalupe fescue proposed critical habitat Chisos Mountains Unit and subunits (amounts may not total due to rounding).

Subunit	Occupied at Time of Listing?	Currently Occupied?	Ownership	Size (ha)	Size (ac)
1	Yes	Yes	National Park Service	2,648	6,542
2	Yes	Yes	National Park Service	391	966
3	Yes	Yes	National Park Service	100	248
4	Yes	Yes	National Park Service	13	32
5	Yes	Yes	National Park Service	10	25
TOTAL				3,163	7,815

Below, we present a brief description of the Chisos Mountains Unit (including all subunits) and reasons why it meets the definition of critical habitat for Guadalupe fescue.

Unit 1: Chisos Mountains

Unit 1 consists of 7,815 ac (3,163 ha) in the Chisos Mountains of Big Bend National Park. This unit is within the geographical area occupied by the species at the time of listing and contains all of the physical or biological features essential to the conservation of Guadalupe fescue. The habitat within Unit 1 consists of elevations of 1,800 m (5,905 ft) or greater, and the associated vegetation is classified as pine, pine-oak, juniper-oak, or conifer-oak. The geographic delineation of the unit resulted in five subunits that are separated from each other by narrow gaps of lower-elevation terrain, but are otherwise similar with respect to vegetation, geological substrate, and soils. The physical or biological features in this unit may require special

management considerations or protection to address threats from changes in wildfire frequency, livestock grazing, erosion and trampling by visitors hiking off the trail, and invasive species.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

On February 11, 2016, we published a final rule (81 FR 7214) that sets forth a new definition of destruction or adverse modification. Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the

Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

- (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
- (2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

- (1) Can be implemented in a manner consistent with the intended purpose of the action,
- (2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,
- (3) Are economically and technologically feasible, and
- (4) Would, in the Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that result in a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of Guadalupe fescue. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of these species or that preclude or significantly delay development of such features. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or

final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for Guadalupe fescue. These activities include, but are not limited to:

(1) Actions that would remove or significantly alter the conifer-oak woodland vegetation. Such actions could include, but are not limited to, cutting or killing trees and shrubs to an extent that a site is no longer suitable to Guadalupe fescue, due to increased levels of sunlight, exposure to wind, or other factors. Fire suppression has changed the natural wildfire cycle and may have altered the conifer-oak woodland habitat to an extent that it is no longer optimal for Guadalupe fescue due to increased tree and shrub densities. Hence, pruning or thinning of woody vegetation may be prescribed to benefit Guadalupe fescue if it is deemed that the tree canopy is too dense; prescribed pruning or thinning would, therefore, not be considered adverse modification. The introduction of invasive plants could also adversely affect Guadalupe fescue through increased competition for light, water, and nutrients, or through an allelopathic effect.

(2) Actions that disturb the soil, or lead to increased soil erosion. Such actions could include, but are not limited to, excavation of the soil; removal of vegetation and litter; or construction of roads, trails, or structures that channel runoff and form gullies. The loss or disturbance of soil could deplete the soil seed bank of Guadalupe fescue or alter soil depth and composition to a degree that is no longer suitable for Guadalupe fescue. However, some actions that affect soil or litter may be prescribed to improve habitat conditions for Guadalupe fescue, such as prescribed burning, and would, therefore, not be considered adverse modifications.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of

Guadalupe fescue, the benefits of critical habitat include public awareness of the presence of Guadalupe fescue and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for Guadalupe fescue due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies. Because Guadalupe fescue critical habitat is located exclusively on National Park Service lands, a Federal nexus exists for any action.

We have not considered any areas for exclusion from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**, above).

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing

scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socioeconomic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for Guadalupe fescue (IEc 2016, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs

(i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation for the species which may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, is what we consider our DEA of the proposed critical habitat designation for Guadalupe fescue and is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O.s' regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess, to the extent practicable, the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely to be affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for Guadalupe fescue, first we identified, in the IEM dated February 23, 2016, probable

incremental economic impacts associated with the following categories of activities: Federal lands management (National Park Service, Big Bend National Park).

We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where Guadalupe fescue is present, Federal agencies will be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species, should the species be listed as an endangered species. If we finalize the proposed listing and critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. Therefore, disproportionate impacts to any geographic area or sector are not likely as a result of this critical habitat designation.

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for Guadalupe fescue's critical habitat. Because the designation of critical habitat for Guadalupe fescue was proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to Guadalupe

fescue would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for Guadalupe fescue consists of a single unit composed of five subunits, all of which are currently occupied by the species. We are not proposing to designate any units of unoccupied habitat. The proposed Chisos Mountains critical habitat unit totals 7,815 ac (3,163 ha) and is entirely contained within federally owned land at Big Bend National Park. We have not identified any ongoing or future actions that would warrant additional recommendations or project modifications to avoid adversely modifying critical habitat above those we would recommend for avoiding jeopardy.

Regarding projects that would occur in occupied habitat outside known population locations, we will recommend that Big Bend National Park first conduct surveys for Guadalupe fescue within the project impact area. If the species is found, we would recommend the same modifications previously described for avoiding jeopardy to the species. If the species is not found, we will recommend only that Big Bend National Park follow its established land management procedures.

We anticipate minimal change in behavior at Big Bend National Park if we designate critical habitat for Guadalupe fescue. The only change we foresee is conducting surveys in areas of critical habitat based on our recommendation for surveys. Based on Big Bend National Park's history of consultation under section 7 of the Act and on the consultation history of the most comparable species, Zapata bladderpod (*Lesquerella thamnophila*), we anticipate that this critical

habitat designation may result in a maximum of two additional consultations per decade.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Exclusions

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared an analysis of the economic impacts of the proposed critical habitat designation and related factors. In our DEA, we did not identify any ongoing or future actions that would warrant additional recommendations or project modifications to avoid adversely modifying critical habitat above those we would recommend for avoiding jeopardy to the species, and we anticipate minimal change in behavior at Big Bend National Park due to the designation of critical habitat for Guadalupe fescue (IEc 2016).

At this time, we are not proposing any exclusions based on economic impacts from the proposed designation of critical habitat for Guadalupe fescue. During the development of a final designation, we will consider any additional economic impact information received through the public comment period, and as such areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for Guadalupe fescue are not owned or managed by the Department of Defense or Department of Homeland Security. In addition, the locations of the proposed critical habitat areas are at high elevations in remote areas of Big Bend National Park and not close enough to the international border with Mexico to raise any border maintenance concerns. Therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise her discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs or other management plans for Guadalupe fescue, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Accordingly, the Secretary does not intend to exercise her discretion to exclude any areas from the final designation based on other relevant

impacts.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data and analyses. We have invited these peer reviewers to comment during this public comment period.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received by the date specified above in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents;

and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

The Service’s current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the Agency is not likely to adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. Moreover, Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this

rulemaking, the Service certifies that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that the designation of this proposed critical habitat will significantly affect energy supplies, distribution, or use, because the proposed critical habitat unit is entirely contained within Big Bend National Park. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)-

(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive

Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because we are designating only a single critical habitat unit that is entirely owned by the National Park Service. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have analyzed the potential takings implications of designating critical habitat for Guadalupe fescue in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that, if adopted, the designation of critical habitat for Guadalupe fescue would not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant

Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we request information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in Texas. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, this proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical and biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on maps, and this document provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir.

1995), cert. denied 516 U.S. 1042 (1996)). Because all of the proposed critical habitat lies outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we will not prepare a NEPA analysis.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined that Guadalupe fescue does not occur on any tribal lands at the time of listing, and no tribal lands unoccupied by Guadalupe fescue are essential for the conservation of the species. Therefore, we are not proposing to designate critical habitat for Guadalupe fescue on tribal lands. In addition, no tribes have expressed interest in either the species or the areas proposed as critical habitat, and no further tribal coordination will be conducted unless requested during the public comment period for this proposed rule.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we

publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of references cited in this rulemaking is available in the SSA Report (Service 2016) on the Internet at <http://www.regulations.gov> and upon request from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rulemaking are the staff members of the Austin Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code

of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361-1407; 1531-1544; and 4201-4245, unless otherwise noted.

2. Amend § 17.96(a) by adding an entry for “*Festuca ligulata* (Guadalupe fescue)” in alphabetical order under Family Poaceae to read as follows:

§ 17.96 Critical habitat—plants.

* * * * *

(a) *Flowering plants.*

* * * * *

Family Poaceae: *Festuca ligulata* (Guadalupe fescue)

(1) Critical habitat units are depicted for Brewster County, Texas, on the map below.

(2) Within these areas, the physical or biological features essential to the conservation of Guadalupe fescue consist of:

(i) Areas within the Chihuahuan Desert:

(A) Above elevations of 1,800 m (5,905 ft), and

(B) That contain rocky or talus soils.

(ii) Associated vegetation characterized by relatively open stands of both conifer and oak trees in varying proportions. This may occur in areas classified as pine, conifer, pine-oak, or conifer-oak, and as forest or woodland, on available vegetation classification maps.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the





legal boundaries on the effective date of this rule.

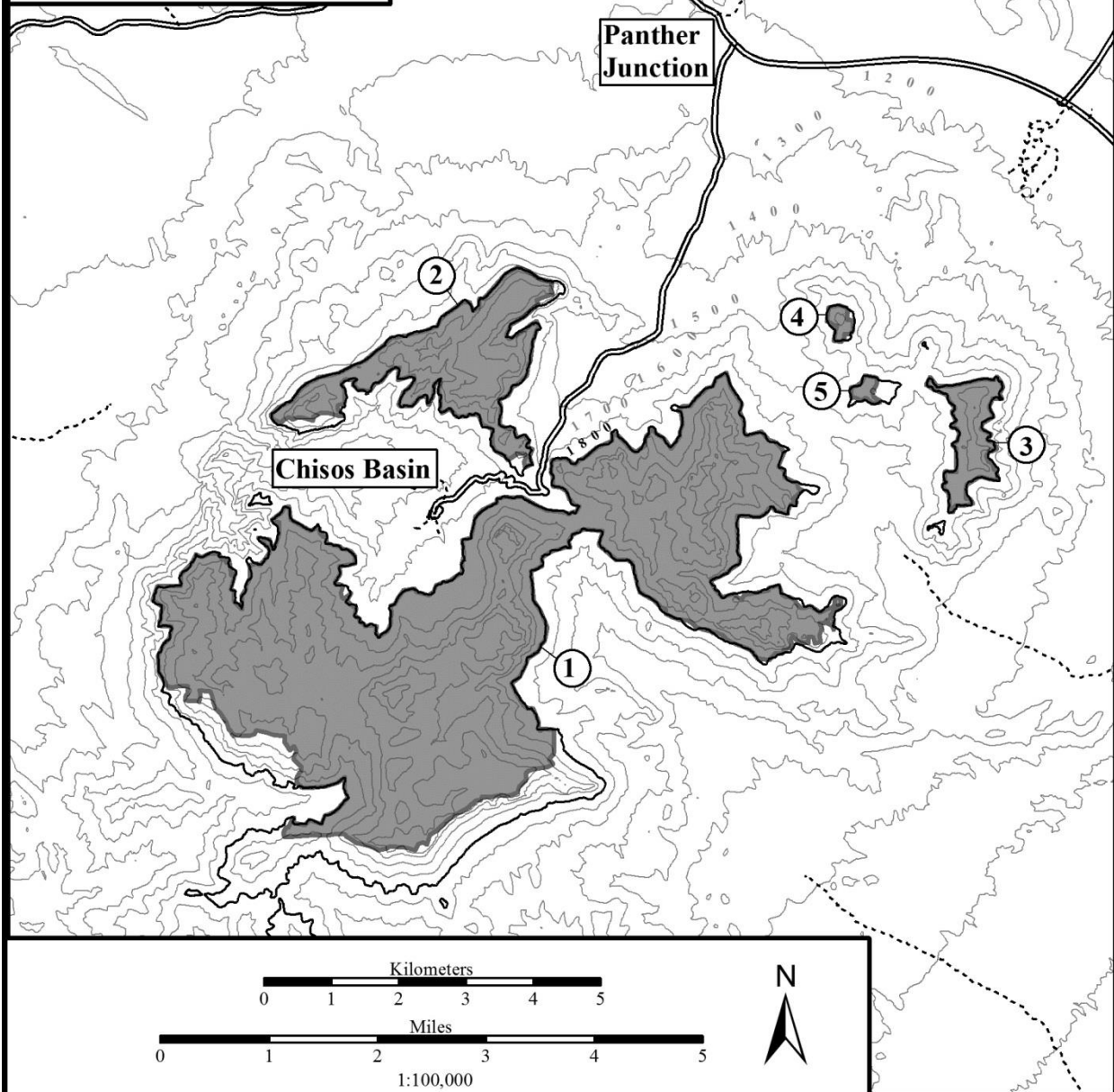
(4) *Critical habitat map units.* We defined the critical habitat unit using the following Geographic Information System data layers: a Digital Elevation Model produced by U.S. Geological Survey; and a Shapefile of vegetation classifications at Big Bend National Park, created and provided to us by Park personnel. The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the Service's Internet site (https://www.fws.gov/southwest/es/AustinTexas/ESA_Our_species.html), at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2016–0100, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Map of Unit 1, Big Bend National Park, Brewster County, Texas, follows:

Guadalupe Fescue Critical Habitat Unit and Subunits, Chisos Mountains, Big Bend National Park.

Symbols:

-  Critical Habitat
-  Park Road
-  2° Park Road
-  100-m Topographic Contour



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Dated: August 22, 2016.

Karen Hyun

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4333–15

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